SUPREME COURT, U. S.
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MICHAEL ROD

No. 73-1423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

AND

TIIDEE PRODUCTS, INC., *Respondents.*

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

WINN NEWMAN
RUTH WEYAND
MELVIN WARSHAW
1126 16th Street, N.W.
Washington, D.C. 20036
Phone: 202-296-1206
Attorneys for Petitioner.

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On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit to review that portion of

the supplemental decisions and orders of the National Labor Relations Board in the instant cases which denied the remedies requested by the Union. The petition of Tiidee Products, Inc., for a writ of certiorari to review other portions of the supplemental decisions and orders in the instant case which granted certain remedies requested by the Union is pending undecided before this Court in Case No. 73-1180.

OPINIONS BELOW

The supplemental decisions and orders of the National Labor Relations Board, whose validity is in issue in petitions for review and applications by the Board for enforcement, now pending undecided before the Court of Appeals for the District of Columbia Circuit, are officially reported, but unpublished as of yet, at 194 N.L.R.B. No. 198 and 196 N.L.R.B. No. 27 and are printed at App. pp. 83 and 98,[1] respectively. The original decisions of the Court of Appeals and of the Board are reported, respectively, at 426 F.2d 1243 (D.C. Cir. 1970), *certiorari denied,* 400 U.S. 950 (1970); 440 F.2d 298 (D.C. Cir. 1970); 174 N.L.R.B. 705; and 176 N.L.R.B. 969, and are printed respectively at App., pp. 109, 132, 45 and 81.

JURISDICTION

The supplemental decisions and orders of the Board were issued on January 24, 1972 and April 6, 1972 (App., pp. 83 and 98). Cross petitions for review under 29 U.S.C. 159(f) were thereafter filed by the charging party Union and Tiidee. The cases were consolidated and briefed in the United States Court of

[1] All references in this petition to App. — are to the Appendix on file in this Court in No. 73-1180.

Appeals for the District of Columbia Circuit, as Case Nos. 72-1691, 72-1692, 72-1080 and 72-1365, and oral argument was held on September 24, 1973 before a three-judge panel of that Court (Robb, J.; Tamm, J.; and MacKinnon, J.). No decision has yet been issued by the Court of Appeals. Jurisdiction in this matter before rendition of judgment by the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101(e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board has the power, as a remedy for an employer's refusal to bargain based wholly on frivolous grounds, to require the employer to make whole the employees and their collective bargaining representative for losses suffered as a result of such refusal to bargain.

2. Whether the Board lacks the power to remedy a frivolous refusal to bargain by an order which requires the employer to make whole losses thereby suffered by employees, computed by the Board on the basis of the wages, hours and other terms and conditions which the other employees have received as a result of collective bargaining.

3. Whether the Board, upon finding that the employer engaged in numerous, repeated and intertwined unfair labor practices, including a frivolous refusal to bargain collectively, abused its discretion by disclaiming the power to provide a meaningful remedy.

4. Whether the Board erred as a matter of law in holding that, even if it did have the power to afford a make-whole remedy, the difficulties in making a fair computation of the losses suffered by employees as a

result of the employer's frivolous refusal to bargain, or the time such a computation would take, excused the Board from making a computation in a case where the Board admitted that the remedy it provided was inadequate to undo the injury so suffered by employees.

5. Whether the Board erred in holding that the practice of the Union, of not collecting initiation fees and dues from employees until it achieves a collective bargaining agreement on their behalf, precluded the Board from entering an order requiring the employer to make the Union whole for the loss of the initiation fees and dues, which it would have collected upon the signing of any agreement by the employer with the Union.

6. Whether the Board erred in holding that the Board was precluded from entering an order requiring the employer to make the collective bargaining representative whole for the amounts it expended because the Union engaged in no extraordinary organizing expense, when admittedly the Union had made expenditures which were rendered useless as a result of the employer's frivolous refusal to bargain.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. 151, *et seq.*, are printed in Appendix A to this petition, pp. 1a-3a, *infra*.

STATEMENT OF THE CASE

Status of cases in the court below

Tiidee Products, Inc., the employer in this case, has filed a petition for a writ of certiorari now pending undecided in this Court (Case No. 73-1180) asking this

Court to review before judgment in the court below two questions, one relating to the power of the Board to order reimbursement of litigation expenses, and the other relating to the propriety of such an order in the instant case (Pet. in No. 73-1180, p. 3). The Union, the petitioner here, opposes a piece-meal review by this Court of only a portion of the cases pending below, but urges upon this Court a review of all the questions now pending undecided in the court below.

There are four cases pending undecided in the court below, two of which are known as *Tiidee I* and two of which are known as *Tiidee II*. All four cases were consolidated in the court below for briefing and oral argument. The two cases known as *Tiidee I*[2] are Court of Appeals Case No. 72-1080 which is the Union petition to review, and Court of Appeals Case No. 72-1691 which is the employer petition to review, the Board's supplemental order in 194 N.L.R.B. No. 198 (App., pp. 83-97), which was before the Board on remand from the Court of Appeal's decision reported in 426 F.2d 1243 (D.C. Cir. 1970), *certiorari denied* 400 U.S. 950 (1970). The two cases known as *Tiidee II*[3] are Court of Appeals Case No. 72-1365 which is the Union petition to review, and Court of Appeals Case No. 72-1692 which is the employer's petition to review, the Board's supplemental order in 196 N.L.R.B. No. 27 (App., pp. 98-106), which was before the Board on remand from the Court of Appeals decision reported in 440 F.2d 298 (D.C. Cir. 1970). The petitions for re-

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[2] *Tiidee I* relates to N.L.R.B. Cases Nos. 9-CA-4440, 4488, 4536 and 4563 (App. pp. 1, 6, 45, 83).

[3] *Tiidee II* relates to N.L.R.B. Cases Nos. 9-CA-4618, 4639-2, 4710 (App., pp. 4, 47, 81, 98).

view filed by the Union challenged the failure of the Board to accord the Union the make-whole and other remedies which the Court of Appeals held the Board had the power to award. The petitions for review filed by the employer challenged the Board's award of litigation costs to the Union and the Board.

The certification of the Union

Tiidee Products, Inc., is engaged in the manufacture of metal and plastic parts for mobile homes and travel trailers at Dayton, Ohio (App., p. 8).

Tiidee's employees were unorganized in July 1967 when the Union began its organizing campaign (App., pp. 8, 13-14). Meetings were held in the homes of employees, employees were solicited to sign authorization cards, and handbills were distributed by the Union in front of the plant (App. pp. 13-14).

On August 1, 1967 the Union filed with the Board a petition for an election (App., p. 8). An election was conducted by the Board on September 14, 1967, which was won by the Union by a vote of 19 to 6, with 3 challenged ballots (App., p. 10).

The employer reacted to the Union's victory in the election by locking out its employees on the morning following the election, laying off the Union observer, and laying off and discharging other Union supporters (App., pp. 20-34).

On September 21, 1967 and October 23, 1967 the first (9-CA-4440) and the second (9-CA-4488) of the four charges of unfair labor practices, which resulted in the case known as *Tiidee I,* were filed by the Union (App. p. 1).

Objections to the election which the employer filed (App. p. 10) were dismissed by the Regional Director without a hearing and on November 8, 1967, the Union was certified (App. p. 10).

Original decree of Board and court below in Tiidee I

In the usual proceedings on charge, complaint, hearing and order of the Board, followed by review and enforcement proceedings in the United States Court of Appeals for the District of Columbia Circuit, the Board found, and the Court of Appeals upheld all of its findings (App. pp. 8-46, 109-125), that the Tiidee Company engaged in the following unfair labor practices:

From the outset of the organizing drive Tiidee's president, Hollander, openly expressed to employees his determination never to have a union in his plant, threatening that "if they got in, he would close the doors" (App. pp. 14, 29). President Hollander and other supervisors unlawfully interrogated employees to determine the identitiy of union adherents and the extent of union activity among employees (App. pp. 14-19, 29-30) and sought to induce employees to act as informers concerning the union activities of fellow employees (App. 14-15, 30). Under employer aegis employees were polled by a supervisory employee who asked each employee to sign a petition with a yes or no after his name indicating whether or not he or she wanted an election to determine if a union should be chosen as his or her representative (App. pp. 16-18, 30).

Following the certification of the Union, Tiidee not only refused even to meet with the Union (App. pp. 10-11, 13) or to furnish it requested information as to

the employee's existing wages and fringe benefits (App. pp. 10, 11, 13) but also engaged in a campaign of eliminating union supporters from the plant by discharging two and laying off others solely because the Union won the election (App. pp. 20-26, 31). Tiidee in retaliation against employees for selecting the Union, also arbitrarily increased production quotas of employees, thereby discriminating against them in order to discourage membership in the Union (App. 25, 32).

While Tiidee purported at the time it refused the Union's initial request for bargaining to base its refusal on its desire to litigate the validity of the certification of the Union (App. p. 11) both the Board (App. pp. 12, 43-46) and the Court (App. p. 115) found that Tiidee's objections to the election were "patently frivolous[4] and violated the express terms of the Agreement for Consent Election, entered into with the Union only thirteen days before the election, to abide by the decision of the regional director" (App. p. 115). Neither before the Board nor in the court did Tiidee ever give "a hint of support or explanation for its claim that the regional director acted 'arbitrarily and capriciously' " (App. p. 115). The Board found that Tiidee's refusal to bargain pending litigation evidenced that the "Employer is seeking to avoid the obligations imposed by statute" (App. p. 13), "evinces

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[4] The statement in the petition now before this Court in No. 73-1180 that the Board in its initial decision in *Tiidee I* made no finding that the Company had engaged in a frivolous refusal to bargain (Pet. No. 73-1180, p. 5) is inaccurate. The Board in its decision in *Tiidee I* adopted all the findings of the Trial Examiner (App. pp. 45-46), one of which was an express finding that the basis of the Company's refusal to bargain was "frivolous" (App. p. 12).

a complete rejection of the collective bargaining principle" (App. p. 36) and "manifested an attitude of hostility directed toward the very basic purposes of the Act" (App. p. 38).

In the court below Tiidee made no effort in either its brief or oral argument to justify its refusal and indeed conceded both its "clear antiunion animus" from the "very beginning" of the organizational drive and its unlawful refusal to bargain collectively (App. p. 111). The court characterized the position of Tiidee as "palpably without merit with respect to its refusal to bargain" (App. p. 118), as a "clear and flagrant violation of the law" (App. p. 115), "a brazen refusal to bargain, in violation of solemn obligations" (App. p. 116), "a manifestly unjustifiable refusal to bargain" and "abuses like those before us" (App. p. 119).

The Union, at the hearing before the Trial Examiner (App. p. 37), in its exceptions to the Trial Examiner's decision and in the court below (App. pp. 111, 124-125) sought an order requiring Tiidee to remedy its refusal to bargain by making whole the employees and the Union for losses suffered as a result of such refusal (App. pp. 37, 111, 124-125). The Trial Examiner "allowed the Union to develop fully in the record all evidence necessary to sustain its position in this issue" but declined to grant the requested remedy because it involved "both legal and policy questions which should be initially considered by the Board" (App. p. 37). Accordingly the Trial Examiner recommended only the conventional prospective type order respecting the refusal to bargain, namely to cease and desist from refusing to bargain and upon request bargain collectively with the Union (App. pp. 37-40).

The Board in its short decision in which it adopted the findings, conclusions and recommendations of the Trial Examiner (App. pp. 45-46), made no mention of the fact that the Union sought any additional remedy.

In a carefully reasoned opinion the court of appeals held that the purely prospective type of order, "assuming" its "general validity", in a case of "brazen refusal to bargain, in violation of solemn obligations", "operates in a real sense so as to be counterproductive and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant" (App. pp. 116-117). The court held that a prospective-only order did not further labor policy because it enabled an employer to reap two fold benefits from his refusal to bargain: during the period before the enforcement of the Board's order the employer gets what he considers the economic benefit of the refusal to bargain (App. p. 117); when the employer is ordered to bargain with the union some years later, "the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively" (App. p. 117).

The court below detailed the injuries imposed by a purely prospective type order on employees, the union, other employers who bargain in good faith and suffer an economic disadvantage (App. pp. 116-120), the Board and the courts whose administrative and judicial resources are drained and diverted by encouraging "frivolous litigation" (App. p. 118).

Analyzing pertinent statutory language and precedents in this and other courts, the court below held that

the Board had the power to order a make-whole remedy for the refusal to bargain in this case (App. p. 120). The court below found nothing in this Court's decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970) which impinged on the power of the Board to give the make-whole remedy which the court ordered the Board to consider. In this respect the court below stated (App. p. 124):

> "We in no way suggest either that the Board can compel agreement or that the make-whole remedy is appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act. It is not within the scope of our remand for the Board to measure the amount of damages by reference to any contract term which could have been brought about only through a mandate to the employer not merely to engage in the process of collective bargaining but also to agree on a contract provision."

The court below accordingly enforced in full the order entered by the Board and at the same time remanded the Union's request for additional relief to the Board for further proceedings consistent with the court's opinion (App. p. 125). Judge MacKinnon concurred in the enforcement of the Board's order but dissented from the remand because he read this Court's decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970) as foreclosing the issue of the Board's power to

grant the requested make-whole remedy (App. pp. 130-131).

Prior petition for writ of certiorari in Tiidee I

Tiidee petitioned this Court (Case No. 654, O.T. 1970) for a writ of certiorari to review the decision of the court below in *Tiidee I*. The Union filed a brief in support of the petition for certiorari but the Board opposed on the ground that the issue "is not ripe for review." Explaining why the case should not be reviewed at this stage the Board in its Memorandum in Opposition (p. 3) stated "should the Board refuse the make-whole remedy in this case, its expressed reasons may satisfy the court of appeals" or "it may provide lesser alternative relief which neither party appeals or which the court concludes is adequate under the circumstances here." The Supreme Court denied the writ. *Tiidee Products, Inc.* v. *NLRB,* 400 U.S. 950.

Original decision of Board and court below in Tiidee II

All of the unfair labor practices occurring in 1967 were included in the complaint in *Tiidee I,* in which the hearing before the Trial Examiner took place on January 16-18, 1968 (App., pp. 1-2). Tiidee subsequent to the hearing in *Tiidee I* engaged in further unfair labor practices, which resulted in three additional charges which were tried by the Board and the Court in cases known as *Tiidee II*. The Board in *Tiidee II* found (App., pp. 47-82) and the court of appeals upheld all of its findings (App., pp. 132-135), that Tiidee engaged in the following additional unfair labor practices:

During 1968 Tiidee discriminatorily discharged five employees (App., pp. 56-69). One of these,

Tackett had been the Union observer and testified adversely to Tiidee in the hearing in *Tiidee I* (App., pp. 62-66). Her discharge was in retaliation against her for acting as a Union observer and appearing as a witness in the *Tiidee I* hearing and violated Section 8(a)(1), (3) and (4) (App., p. 66). Two others, Haywood and Wilson, had likewise been witnesses in *Tiidee I* and their discharges similarly violated 8(a)(1), (3) and (4) (App., pp. 56-58, 66-69).

By the time the hearing in *Tiidee II* took place on September 18 and 19, 1968 (App., p. 44) Tiidee had discriminatorily discharged or laid off thirteen out of the nineteen employees who voted for the Union (App. pp. 56-60, 62-69). A fourteenth employee who was discriminatorily discharged, Pauline Messer, had been hired for the first time subsequent to the election and signed a Union card (App., pp. 61-62).

Within a few days after the hearing on January 16-18, before the Trial Examiner in *Tiidee I* (App., p. 2), Tiidee instituted new hiring procedures and posted a set of work rules and regulations, prohibiting solicitation or distribution of literature on company premises and specifying a code of progressive discipline, with warnings for minor offenses, three-day layoff for major offenses and discharges for an intolerable offense (App., pp. 51-52, 69-70). Tiidee was motivated to post the rules by hostility to the Union (App., p. 52). These rules were repeatedly used discriminatorily by Tiidee to coerce the Union supporters (App., pp. 51-52, 69-70). Aside from their discriminatory motivation and discriminatory application and the inherent invalidity of the no solicitation and no distribution provisions (App., pp. 51-52), the posting

and implementation of these rules without first bargaining with the Union constituted an unlawful refusal to bargain because thereby Tiidee unilaterally changed the terms and conditions of employment in derogation of the certified status of the Union as bargaining representative (App., pp. 69-70).

The Union again requested that as a remedy for its unlawful refusal to bargain, the Board should order Tiidee to make whole employees for the wages and benefits which they lost as a result of Tiidee's refusal to bargain (App., p. 73). The Board again declined to grant this remedy (App. pp. 73). On the Union's petition for review filed in the court of appeals, the court sustained in full the Board's findings of fact, enforced its order and remanded to the Board to reconsider its remedy in accordance with the principles announced by the court of appeals in its opinion in *Tiidee I* (App. pp. 132-135).

Proceeding before Board and supplemental decisions on remands

The Board in each *Tiidee I* and *Tiidee II* notified the parties that it was accepting the remand and invited them to file statements of position (App. pp. 83-84, 98-99, 107-108). The Union filed statements of position in each case (App. pp. 84, 99) in which it proposed that the Board itself determine the losses suffered by the employees and the Union, on the basis of the record already before the Board, as supplemented by the attachments to the statement of position and such additional evidence as the employer might submit to the Board (App. pp. 84, 87). Alternatively the Union requested the Board to enter an order remanding the

cases to a Trial Examiner for a hearing for the purpose of determining what amount, if any, in dollars and cents is necessary to make whole each employee and the Union, for losses suffered because of the refusal to bargain (App. pp. 87-90).

The Board in each *Tiidee I* and *Tiidee II* refused to accept either of the alternatives proposed by the Union (App. pp. 87-90, 100). Instead the Board in each *Tiidee I* (App. pp. 83-97) and *Tiidee II* (App. pp. 98-108) held that it could not grant a make-whole remedy because to do so, "(i)nevitably the Board would have to decide * * * what the parties '*should* have agreed to' and this, the court stated, the Board must not do" (App. p. 87) (emphasis that of the Court of Appeals, see App. p. 122). The quoted language and the reference by the Board to what the Board "must not do" refer to the ruling of the Court of Appeals that the Board could measure the make-whole remedy "not by any sentiment as to what the parties *should* have agreed to, but only * * * what it is likely the parties would have agreed to" (App. p. 122).

In the Board's view the same lack of power to make-whole the employees for their losses, prevented the Board from entering an order requiring the employer to reimburse the Union for lost initiation fees and dues. The Board stated, "We view this claim as partaking of a request for a make-whole remedy * * * since presumably the dues and fees sought would have to come from lost wages" (App. p. 90).

To excuse its failure to grant a "make-whole" remedy, the Board also relied upon the difficulty of ascertaining "with even approximate accuracy what

the parties '*would* have agreed to' " (App. p. 87, emphasis in Board's quotation) and the "long delay" which would result from devising a "make whole" formula (App. p. 87).

The Union's request for an award of organizational expenses was denied on the ground that "the Union incurred no extraordinary organizational expenses because of Respondent's patently frivolous objection to the election and subsequent refusal to bargain" (App. p. 90).

The Board, however, did supplement its prior remedy with the following alternative remedies which the Board believed would "undo some of the baneful effects" of the employer's unfair labor practices (App. p. 88): mailing to the homes of employees copies of notice which accompanied the Board's order (App. 88); affording the Union access to bulletin boards in the plant for the posting of union notices, bulletins and other literature, together with the names and addresses of all employees for a one year period following the Board's Supplemental Decision (App. p. 89); and reimbursement of the Union and the Board for their expenses incurred in the investigation, preparation, presentation and conduct of these cases including costs and expenses of counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses (App. p. 91).

On the remand in *Tiidee II,* the Board found that the employer's conduct in *Tiidee II* "was part of the same pattern of patently frivolous litigation for the same unlawful object" (App. p. 100) and required the

same additional remedies of mailing of notices to homes of employees and award of litigation costs to the Union and the Board (App., p. 100).

That the remedy provided was inadequate to undo the unfair labor practices committed by Tiidee was admitted by the Board (App. p. 88).

REASONS FOR GRANTING THE WRIT

Tiidee in its Petition for Writ of Certiorari Before Judgment (Case No. 73-1180) has asked this Court to review the question of the power of the Board to award litigation costs as part of its remedial orders. We agree that this is a question which should be reviewed by this Court but we urge that the review should encompass the whole issue of power to remedy a frivolously based refusal to bargain, as raised in the *Tiidee* cases now pending in the Court of Appeals for the District of Columbia Circuit, rather than the piecemeal taking by this Court of one aspect of that issue before judgment in the court below.

1. There is a crisis in the administration of the National Labor Relations Act which makes it imperative that this Court review at the earliest possible date the question of the power of the Board to issue a make-whole order to remedy a frivolous refusal to bargain.

The members of the National Labor Relations Board, including its present chairman, as well as the predecessor chairman of the Board, are agreed that if the Board does not have the power to grant a make-whole remedy, the Board lacks any effective means of enforcing Section 8(a)(5) of the Act. In *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), the Board held that it did not have the power to grant a make-whole remedy for refusal to bargain. Chairman Miller, joining with

Board Members Fanning and Jenkins, who constitute a majority of the present Board, stated (185 N.L.R.B.), at p. 108:

> "We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where, as in the recent *N.L.R.B.* v. *Tiidee Products, Inc.*, case, * * * the employer had raised 'frivolous' issues in order to postpone or avoid its lawful obligation to bargain." (Footnote omitted.)

Predecessor Chairman McCulloch and predecessor Board Member Brown, dissenting in *Ex-Cell-O,* urged that the Board did have the power to give a make-whole remedy which the majority recognized was essential to make Section 8(a)(5) effective and pointed to the widespread recognition in the courts, Congress and academic circles, of the inadequacy of the remedies which the Board has traditionally used. The dissent stated (185 N.L.R.B.) at p. 115:

> "The present remedies for unlawful refusals to bargain often fall short, as in the present case, of adequately protecting the employees' right to bar-

gain. Recent court decisions, congressional investigations, and scholarly studies have concluded that, in the present remedial framework, justice delayed is often justice denied.

* * *

"A study by Professor Philip Ross shows that a contract is signed in most situations where the employer honors its duty to bargain without delay, but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order. In the interim, of course, the employees are deprived of their rightful union representation and the opportunity to bargain over their terms and conditions of employment, while at the same time their employers may gain a monetary advantage over their competitors who have complied with their legal duty." (Footnotes omitted)

The dissent cited (185 N.L.R.B., at 115, fn. 45) the Cox Advisory Panel's report to the Senate Committee on Labor and Public Welfare [5] and testimony given at the hearings before the Special Subcommittee on Labor in 1968. [6] In addition it could have cited the Report of the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong., 2d Sess. (Comm. Print. p. 2) which stated:

"Employers who violate the law are encouraged to do so as the penalties come too late for effective enforcement, and in any event have little or no deterrent force."

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[5] Report pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1960).

[6] See testimony of Mozart G. Ratner during Hearings on Congressional Oversight of Administrative Agencies (NLRB) before the Subcommittee on Separation of Power of the Senate Committee in the Judiciary, 90th Cong., 2d Sess. Part 1, 1968, pp. 204, 214.

Similarly the Subcommittee on NLRB of the House Committee on Education and Labor, 87th Cong., 1st Sess., Report on Administration of the LMRA by the NLRB (Comm. Print., p. 2, 1961) stated:

> "A partial reason for the caseload, and hence the delay in unfair labor practice cases, lies in the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a 'slap on the wrist'. They are too little and too late. They constitute, in the words of one witness, 'a license fee for union busting'. The subcommittee recommends that the Labor Board reconsider the problem of 'remedies' with an eye to taking the profit out of unfair labor practices."

The caseload to which the above quoted subcommittee report refers has increased, with respect to refusal to bargain cases, three-fold since the date of the report. Indeed the history of the increase in refusal to bargain cases before the Board during the past 15 years is the most startling evidence of the ineffectiveness of present remedies. In the fiscal year 1955-1956 there were 838 charges under Section 8(a)(5). The number doubled by 1959-1960, trebled by 1962-1963, quadrupled by 1964-1965 and, by 1971-1972, increased seven-fold, with the figure rising to 6,023. No later figures are available but it is a fair inference that they are even higher. The increase in orders to employers to bargain was even more striking. The 23 in 1956-1957, doubled by 1958-1959, increased ten-fold by 1964-1965 and fifteen fold by 1966-1967, when 366 orders to employers to bargain were issued.[7]

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[7] The following table is based on figures in the NLRB's Annual Reports. Page references in parenthesis are to the Annual Report issued by the NLRB for the year indicated in column 1, except that the figures without any parenthesis after them are taken from

the NLRB 12th Annual Report for the fiscal year ended June 30, 1947:

Fiscal Year	No. of charges alleging 8(a)(5)	No. of Decisions finding 8(a)(5)	No. of Cases closed by collective bargaining begun by employer
1935-1936	405 (p. 34)		
1936-1937	1,291 (p. 19)		
1937-1938	2,576 (p. 28)		
1938-1939	1,776 (p. 31)		923
1939-1940	1,253 (p. 15)		881
1940-1941	1,593 (p. 25)		1,009 (p. 36)
1941-1942	1,550 (p. 77)		1,032 (p. 87)
1942-1943	756 (p. 85)		493 (p. 94)
1943-1944	465 (p. 79)		136
1944-1945	507 (p. 81)		116 (p. 85)
1945-1946	1,241 (p. 76)		176 (p. 81)
1946-1947	1,347 (p. 68)		273 (p. 88)
1947-1948	789 (p. 99)		173 (p. 106)
1948-1949	1,070 (p. 159)		228 (p. 166)
1949-1950	1,309 (p. 222)		236 (p. 229)
1950-1951	1,235 (p. 294)		261 (p. 295)
1951-1952	1,226 (p. 281)		197 (p. 282)
1952-1953	1,347 (p. 95)		247 (p. 96)
1953-1954	1,212 (p. 157)		230 (p. 158)
1954-1955	1,213 (p. 161)	65 (p. 5)	135 (p. 162)
1955-1956	838 (p. 165)	54 (p. 2)	117 (p. 166)
1956-1957	827 (p. 163)	23 (p. 3)	91 (p. 164)
1957-1958	1,039 (p. 145)	26 (p. 3)	39 (p. 146)
1958-1959	1,311 (p. 163)	55 (p. 3)	49 (p. 164)
1959-1960	1,753 (p. 180)	53 (p. 12)	269 (p. 181)
1960-1961	1,676 (p. 220)	67 (p. 17)	319 (p. 221)
1961-1962	2,294 (p. 262)	157 (p. 18)	432 (p. 263)
1962-1963	2,584 (p. 164)	165 (p. 21)	548 (p. 165)
1963-1964	3,088 (p. 170)	175 (p. 23)	986 (p. 173)
1964-1965	3,815 (p. 180)	226 (p. 21)	1,022 (p. 183)
1965-1966	3,811 (p. 186)	326 (p. 23)	1,103 (p. 190)
1966-1967	3,819 (p. 218)	366 (p. 15)	1,282 (p. 222)
1967-1968	4,097 (p. 203)	332 (p. 15)	1,371 (p. 206)
1968-1969	3,967 (p. 199)	329 (p. 20)	1,244 (p. 202)
1970-1971	4,489 (p. 157)	244 (p. 18)	1,429 (p. 160)
1971-1972	6,023 (p. 225)	250 (p. 21)	1,510 (p. 228)

The problem of the ineffectiveness of the prospective-type order in refusal to bargain cases has received extensive notice in studies of administration of the National Labor Relations Act and the legal publications. [8]

Harvard Law School's Dean Derek Bok has indicated that continued scoffing at labor law because of the inadequacy of its remedies will cause the law to lose its "moral authority" and "the most serious consequences" will follow. [9]

Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. *N.L.R.B.* v. *American National Insurance Company,* 343 U.S. 395, 402 (1952). Indeed it underlies our entire national policy. *Boys Market, Inc.* v. *Clerk's Union,* 398 U.S. 235, 251 (1970).

While the majority of the National Labor Relations Board in the *Ex-Cell-O* case, suggested that the remedy be sought in Congress, we submit that in an issue of such critical importance this Court should first pass on the question so that it will be clear whether Congressional action is necessary.

The language of the National Labor Relations Act, [10] as this Court has repeatedly held, constitutes a broad

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[8] The list is so lengthy that we have attached it as Appendix B to this petition, pp. 4a-5a *infra.*

[9] Derek Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. Law Rev. 38, 59 (1964).

[10] Section 10(c) of the Act (29 U.S.C. 160(c)) provides: "[T]he Board shall * * * issue and cause to be served * * * an order * * * to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

mandate "to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice."[11] The wrongdoer's liability for "expected profits" lost during the period of the pendency of the litigation is an accepted feature of our judicial system. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 624-625 (1966); *N.L.R.B.* v. *Electric Vacuum Cleaner Co.,* 315 U.S. 685, 698 (1942). Nor has uncertainty as to the amount of the loss ever served to defeat recovery. *Bigelow* v. *R.K.O. Radio Pictures,* 327 U.S. 251, 264-265 (1946). It is urgent that this Court as soon as possible establish that these elementary principles can properly be applied to make whole losses suffered as a result of a frivolous refusal to bargain.

2. The crisis in enforcement of the National Labor Relations Act has been deepened by the Board's refusal to seek injunctive relief under Section 10(j) in refusal to bargain cases, no matter how frivolous

In its decision in *Ex-Cell-O Corp.,* 185 N.L.R.B. 107, 110 (1970) the Board stated that the problem of delay in refusal to bargain cases would be met by the "full resort to the injunctive provisions of Section 10(j) and (e) of the Act". However, the same concern which the Board expressed in its *Ex-Cell-O* decision that a make-whole remedy would unfairly dilute the procedural right of an employer to litigate the validity of

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[11] *Nathanson* v. *N.L.R.B.,* 344 U.S. 25, 27 (1952); *N.L.R.B.* v. *Rutter Rex Mfg. Co.,* 396 U.S. 258, 262 (1969); *Phelps Dodge Corp.* v. *N.L.R.B.,* 313 U.S. 177, 197 (1941); *National Licorice Co.* v. *N.L.R.B.,* 309 U.S. 350, 362-363 (1941); *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261-265 (1940).

a certification of representatives (185 N.L.R.B. at 109) has now been elevated by the Board into a bar to injunctive relief in any case where the refusal to bargain is based on the employer's asserted desire to litigate the validity of the certification. In *John Singer, Inc.*, 197 N.L.R.B. No. 7, 80 LRRM 1340 (May 25, 1972), the Board found the refusal to bargain was based on frivolous grounds but nevertheless, in order to preserve undiminished the employer's right to litigate the issue, directed the General Counsel, in applying for preliminary injunctive relief under Section 10(e) as to other unfair labor practices, not to apply for injunctive relief as to the refusal to bargain. The Board stated (80 LRRM at 1341):

> Clearly, no meaningful bargaining can take place when at the same time the Respondent is contesting its bargaining obligation.

In accordance with the principles stated in the *John Singer* case, we understand that the Board is not applying for preliminary injunctions in any cases of a refusal to bargain based on a stated intention to litigate the validity of a certification.

Congress, both in the original enactment of the Act,[12] and by rejection of amendments proposed in 1947[13] to make certifications subjects to direct judicial

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[12] Congress at the time it enacted the Act in 1935 deliberately refrained from providng any direct judicial review of certifications or bargaining representatives because "[t]his endlessly delays the beginning of collective bargaining". 93 Cong. Rec. 3446, reprinted 1 Leg. His. NLRA 653.

[13] For the full legislative history of efforts to make certifications subject to direct review see Sen. Rep. No. 573 Committee on Education and Labor, 74th Cong. 1st Sess., pp. 5-6, 14, reprinted

review, clearly manifested the Congressional intent that employers should not be able to test the validity of certifications without liability for losses suffered during the period of litigation. The posture of the Board in both its refusal to award a make-whole remedy and its refusal to apply for temporary injunctions under Section 10(e) and (j) flies in the face of the scheme of the Act as envisioned by Congress.

Because of the crisis in enforcement of the Act which this misinterpretation of the statute is occasioning, immediate review by this Court is urged.

3. The court below has issued a full opinion stating its views on all questions presented

Unlike most cases in which review is sought before judgment below, the court below has issued a lengthy, carefully considered, well annotated opinion ruling on all of the questions here presented (App. pp. 114-125). Hence the absence of judgment below in the cases when they returned to the court following the remand, is of little, if any, relevance to the grant of review by this Court at this time.

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2 Leg. His. NLRA 2304, 2314; House Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess. pp. 6-7, 23 reprinted 2 Leg. His. NLRA 3052-3053, 3073; 79 Cong. Rec. 7658, reprinted 2 Leg. His. NLRA 2370. The Hartley Bill in 1947 was reported out of Committee with a provision for a direct review of certifications. See House Rep. No. 245, 80th Cong., 1st Sess. p. 43, reprinted 1 Leg. His. LMRA 334. Congress, however, rejected this amendment in order not to permit any interference with the duty to begin collective bargaining as soon as the union is certified. See Conference Report, House Rep. No. 510, 80th Cong., 1st Sess., pp. 56-57, reprinted 1 Leg. His. LMRA 560-561; 93 Cong. Rec. 6444.

CONCLUSION

For the foregoing reasons it is urged that this petition be granted. However, if the Court does not grant this petition for review, we urge that the petition in Case No. 73-1180 be denied.

Respectfully submitted,

WINN NEWMAN
RUTH WEYAND
MELVIN WARSHAW
1126 16th Street, N.W.
Washington, D.C. 20036
Phone: 202-296-1206
Attorneys for Petitioner.

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